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Supreme Court, U.
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MICHAEL RODAK, JR., C

No.

In the
Supreme Court of the United States
October Term, 1971

SAM ADAM,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioner, Sam Adam, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered January 28, 1972.

OPINION BELOW

The opinion of the Supreme Court of Illinois, 280 N.E. 2d 205, appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on January 28, 1972. A timely petition for rehearing was denied on March 29, 1972, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. DOES THE FOURTH AMENDMENT PROTECT A LAWYER FROM BEING COMPELLED TO TESTIFY AGAINST HIS CLIENT BEFORE A GRAND JURY UNLESS THE STATE FIRST SHOWS THE REASONABLENESS OF THE GRAND JURY'S REQUEST FOR SUCH TESTIMONY?

2. MAY A LAWYER SUMMONED BEFORE THE GRAND JURY TO TESTIFY ABOUT COMMUNICATIONS WITH HIS CLIENT—A PREVIOUS WITNESS BEFORE THE SAME GRAND JURY—LAWFULLY ASSERT THE CLIENT'S SIXTH AMENDMENT RIGHT TO COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE?

STATEMENT OF THE CASE

Petitioner is a member in good standing of the bar of this Honorable Court. He has been adjudged in contempt for refusal to answer three questions about his client, one Shirley Walker, before the Cook County Grand Jury. Petitioner's refusal to answer was predicated upon his own Fourth Amendment right of security, his client's Sixth Amendment right to counsel, and the attorney-client privilege. Petitioner specifically has disavowed any fear of self-incrimination.

The facts arose as follows: Shirley Walker, an admitted prostitute and narcotic addict was charged with murder and incarcerated in jail. While there, and without benefit of counsel, she was prevailed upon by the police and the State's Attorney to sign a statement implicating four others in the murder, who were then arrested. Thereupon, she was taken from the jail to a motel and provided with

every luxury. At her first opportunity, however, Miss Walker escaped, immediately contacted the lawyer (not petitioner) for one of the four she had implicated, and disavowed her fabrication. When the State's Attorney learned of Miss Walker's turnabout, Miss Walker was subpoenaed before the Grand Jury whereupon she retained petitioner as her counsel.

At first, Miss Walker refused to answer any questions before the Grand Jury, but after the Assistant State's Attorney assured the court that "nothing will in any way incriminate her", she answered all questions put to her about the murder. Later the same day, however, another Assistant State's Attorney revealed to a different judge that the true purpose in subpoenaing Miss Walker was in order to compel her to incriminate herself with respect to possible charges of perjury and obstruction of justice. The next day, when the State's perfidy was revealed, the State's position changed again and the State informed the Court that it was a Chicago Police Officer who was the subject of the "investigation" by the grand jury.

Miss Walker was then granted immunity, but when she attempted to inform the Grand Jury about certain corruption within the Chicago Police Department, the State's Attorney switched the tenor of the questions to the circumstances under which she obtained her counsel (Petitioner herein) and her conversation with him.

After Miss Walker supposedly answered (we say "supposedly" because only the State's Attorney has a copy of the minutes) these questions, Petitioner was called before the same Grand Jury and asked the same questions. Petitioner refused to answer on the grounds that the State's Attorney's office was obviously engaged in harassing Miss

Walker (and, incidentally, Petitioner); that no purpose for the inquiry of Petitioner had been stated; that Petitioner's Fourth Amendment right of security and privacy was being infringed; and that Miss Walker's Sixth Amendment right to counsel and the attorney-client privilege was at stake.

However, Petitioner specifically disavowed any Fifth Amendment claim and in fact invited the State's Attorney to ask Petitioner any questions about *himself*.

Petitioner was thereupon taken before the court, adjudged in contempt and sentenced to ten (10) days incarceration.

Bail was granted and on appeal the Supreme Court of Illinois affirmed as to two questions (and reversed and remanded as to one) holding that Petitioner had no Fourth Amendment right under the circumstances, and that Miss Walker had waived the attorney-client privilege by testifying albeit under a subpoena and grant of immunity.

In order to demonstrate that Miss Walker did not in fact waive the attorney-client privilege, Petitioner moved that her Grand Jury testimony be made available either to Petitioner or to the Illinois Supreme Court *in camera*. The motion was denied.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW VIOLATES THE FOURTH, SIXTH AND FOURTEENTH AMENDMENTS AND CONFLICTS WITH DECISIONS OF OTHER COURTS.

Petitioner's refusal to answer the questions was predicated upon the following propositions: That the Fourth Amendment requires some showing of reasonableness before a witness may be compelled to testify before the Grand Jury; and that Miss Walker's Sixth Amendment right to counsel and the attorney-client privilege compelled Petitioner to remain silent.

The Illinois Supreme Court summarily rejected the Fourth Amendment argument, 280 N.E. 2d at 207, and also held that by answering the questions herself, Miss Walker had waived the attorney-client privilege.

I.

The Illinois Supreme Court's decision in the case at bar directly conflicts with two recent decisions of the Seventh Circuit Court of Appeals, *In Re Dionisio,* 442 F.2d 276, and *In Re September 1971 Grand Jury,* 454 F.2d 580, (Certiorari granted, May 30, 1972, in both cases, *sub nom United States* v. *Dionisio,* 71-229, and *sub nom United States* v. *Mara,* 71-850, respectfully); with two decisions of the Court of Appeals for the Third Circuit, *In Re Grand Jury Proceedings, Harrisburg, Pennsylvania,* 450 F.2d 199 (Certiorari granted *sub nom United States* v. *Egan,* December 14, 1971, 71-263), and *In Re Grand Jury Investigation,* 444 F.2d 499, 3 Cir., 1971; and with *In Re Riccardi,* 337 F. Supp. 253, D.C.N.J., 1972; *United*

States v. *Bailey*, 327 F. Supp. 802, D.C.Ill., 1971; and *United States* v. *Praigg*, 336 F. Supp. 480, D.C., Calif., 1972; all of which decisions hold that a grand jury witness may successfully assert Fourth Amendment guarantees.

II.

The Illinois Supreme Court's conclusion that by testifying Miss Walker waived the attorney-client privilege is without any factual or legal basis whatsoever. No one, except the State's Attorney, has seen her testimony. The Supreme Court not only refused to make her testimony available to Petitioner, but also denied Petitioner's motion that the court itself examine her testimony *in camera* to determine whether she knowingly and intelligently waived her constitutional guarantees. See *Johnson* v. *Zerbst*, 304 U.S. 458. Furthermore, how could any "waiver" be deemed voluntary when given pursuant to a subpoena and under the compulsion of an immunity grant?

CONCLUSION

To resolve these important questions of clearly Constitutional dimensions, Petitioner prays that the Court grant the instant petition for writ of certiorari and reverse the judgment and conviction below.

Respectfully submitted,

R. Eugene Pincham
Edward M. Genson
Arnette R. Hubbard
Counsel for Petitioner

APPENDIX

Docket No. 44722—Agenda 32—November, 1971.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. SAM ADAM, Appellant.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

Defendant, Sam Adam, appeals from the order of the circuit court of Cook County adjudging him in contempt of court and sentencing him to 10 days in the House of Correction. We allowed his motion for leave to file an original action in *habeas corpus* and have consolidated the original action and the appeal for consideration and opinion.

The record shows that Shirley Walker was called to testify before the September, 1971, Cook County grand jury which was investigating an alleged obstruction of justice in a police investigation of a murder. Defendant Adams, Miss Walker's attorney, was called to testify before the same grand jury. He testified that he was her attorney and, although ordered to do so by the circuit court, he refused to answer the following questions:

> "1. When did you become the lawyer for Shirley Walker?
>
> 2. Would you tell the Ladies and Gentlemen of the Grand Jury the circumstances surrounding your employment as Shirley Walker's lawyer?
>
> 3. I now ask you, Mr. Adam, to inform this Grand Jury as to that conversation that took place between you and Miss Walker and Mr. Pincham on Tuesday morning, September 28, 1971, as you were enroute here to the Criminal Courts Building in Mr. Pincham's car?"

Defendant refused to answer the questions primarily on the ground that to do so would result in the disclosure of information protected by the attorney-client privilege, and secondarily on the ground that there was no showing of probable cause for "invading and violating his Fourth Amendment right to be secure in his person against unreasonable search and seizure." The circuit court found his refusal to answer to be contemptuous, imposed sentence, and these proceedings followed.

We consider first defendant's contention based upon the alleged violation of his rights under the fourth amendment. Although the authorities cited by the defendant tend to support his argument that an overly broad *subpoena duces tecum* may constitute an unreasonable search and seizure impermissible under the fourth amendment, we find no authority for the proposition that a grand jury must have probable cause to subpoena a witness to testify. We hold, therefore, that insofar as defendant's refusal to testify was based on the constitutional argument, the circuit court did not err in ordering him to answer the questions.

Defendant contends that all of the matters within the scope of the three qustions which he refused to answer are protected from compulsory disclosure by the attorney-client privilege. The People contend that assuming, *arguendo,* that the matters about which defendant was interrogated were privileged, Miss Walker had already testified regarding them and the privilege was thereby waived. Defendant argues that because Miss Walker had been granted immunity, her testimony was compelled and involuntary, and there was, therefore, no waiver of the privilege.

The attorney-client privilege exists in order that one who is, or seeks to become a client, may consult freely with counsel without fear of compelled disclosure of information communicated by him to the attorney whom he has employed, or seeks to employ. The essentials of its

creation and continued existence have been defined as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 Wigmore, Evidence, sec. 2292 (McNaughton Rev. 1961).

Counsel have not cited nor has our research revealed a case involving the precise issue here presented. We have examined a number of authorities, many of them conflicting, and conclude that the fact that Miss Walker testified after a grant of immunity and under compulsion is not dispositive of the issue of waiver. Under modern procedures process is available, with rare exception, to compel attendance of witnesses either in court or for deposition and in that sense, most testimony is given under compulsion. The decisive factor, therefore, is whether the privilege was timely asserted by the client for whose protection it exists.

The record before us does not contain the testimony of Shirley Walker before the grand jury. Defendant's brief, however, states that in her testimony she told the grand jury when she employed defendant, and also related the conversations held with defendant in Pincham's car while enroute from the latter's home to the Criminal Courts Building. It is also stated in defendant's brief that while she testified before the grand jury defendant waited outside the grand jury room and that she repeatedly left the grand jury room and conferred with defendant. Defendant does not argue that Shirley Walker was not aware of, and could not, therefore, waive the attorney-client privilege. Under the circumstances shown we need not and do not decide whether the answers to the first and third questions are privileged, because if so, the privilege was waived.

The second question presented an issue more difficult of resolution. Defendant's brief states that Miss Walker testified that she had heard of defendant and that she called his office and spoke with him, arranged to meet him, and retained him. None of these matters are privileged because the privilege applies only to communications made by Miss Walker to defendant. It cannot be determined from the record and briefs whether there were in fact privileged matters communicated to the defendant, and if so, in whose presence, and for what purpose, nor can it be determined whether Miss Walker testified to any such communications. Whether a series of questions might have covered matters, some privileged and some not, is pure conjecture. Under the circumstances, in refusing to answer the question in the form in which it was propounded, we are unable to say defendant was in contempt.

For the reasons herein set forth the petition for a writ of *habeas corpus* is denied. The judgment of the circuit court of Cook County adjudging the defendant guilty of contempt for refusal to answer questions 1 and 3 is affirmed, and as to question 2 is reversed and remanded for further proceedings.

Affirmed in part, and reversed in part and remanded, and writ quashed.